BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA I. SHAPIRO	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,063,336
	)	
U.S.D. 229	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Self-insured respondent requested review of the June 30, 2014, Award entered by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on November 4, 2014. Mark E. Kolich of Lenexa, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent.

The ALJ found claimant is entitled to compensation for a 28 percent impairment to the right lower extremity as a result of her January 5, 2012, injury by accident while working for respondent. The ALJ granted future medical treatment upon proper application to the Division. The ALJ found he had no authority to pass upon claimant's issue of the constitutionality of the 2011 amendments to the Kansas Workers Compensation Act; therefore, no findings were made in that regard.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues only claimant's meniscus injury to the right knee results from her January 5, 2012, work-related accident and any need for future medical treatment is due to claimant's preexisting knee condition. Respondent contends claimant failed to sustain her burden of proving she is entitled to permanent partial disability benefits. Further, respondent argues the ALJ erred in denying its request for an extension of its terminal date.

Claimant contends the ALJ's Award should be affirmed. Moreover, claimant understands the Board lacks jurisdiction to rule on the constitutionality of the 2011

amendments to the Workers Compensation Act, but raises the issue so it may be preserved in the event of future appeals.

The issues for the Board's review are:

1. Did claimant sustain an injury to her knee arising out of and in the course of her employment with respondent?

2. What is the nature and extent of claimant's disability?

3. Should respondent's request for an extension of its terminal date have been granted?

4. May the Board address the constitutionality of the 2011 amendments to the Kansas Workers Compensation Act?

5. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant has worked for respondent 16 years as an interrelated resource teacher. On January 5, 2012, claimant sustained an accident while teaching in her classroom. Claimant testified:

> A student had pushed their chair out. Meanwhile a student behind me was talking. I went to turn around, the chair was pulled extremely far out, it wasn't even close to underneath the desk, and I tripped over the chair and then there was a table there and I fell on top of the table.[1]

Claimant indicated she heard a loud pop when she fell, and her right knee gave out. Claimant saw the school nurse, who provided a wheelchair and applied ice to claimant's right knee. After completing paperwork, respondent's nurse directed claimant to Occupational Health Services (OHS). Physicians at OHS took x-rays of claimant's knee and provided both pain medication and crutches. Claimant was taken off work the following Monday during a follow up visit to OHS because she was unsteady and unable to bear weight. An MRI was obtained on January 10, 2012, and claimant was referred to Dr. Daniel Stechschulte.

Claimant testified she had a right anterior cruciate ligament (ACL) repair in March 1992. She then underwent an examination/manipulation under anesthesia of the right knee in April 1992. She underwent the same procedure in July 1992, with arthroscopic

[1] R.H. Trans. (Jan. 15, 2014) at 4-5.

debridement and lateral capsular releasing. Claimant stated she was released from care in 1994 and suffered no difficulties with her right knee until the incident of January 5, 2012. Claimant testified she lived an active lifestyle and had full range of motion of the right knee prior to 2012.

Dr. Stechschulte, an orthopedic surgeon, first examined claimant on January 17, 2012. Dr. Stechschulte reviewed claimant's MRI, the findings of which were consistent with a previous ACL repair and included degenerative changes. Dr. Stechschulte took x-rays and found degenerative arthritis in claimant's right knee. He recommended claimant lose weight and discussed other treatment options. Claimant elected to proceed directly to surgery. Dr. Stechschulte performed a diagnostic arthroscopy, partial medial and lateral meniscectomies, chondroplasty of the patellofemoral joint, and loose body removal on February 1, 2012.

Claimant followed up with Dr. Stechschulte on February 9, 2012. He put her on light duty and recommended physical therapy. Claimant continued to treat with Dr. Stechschulte and undergo physical therapy until her release at maximum medical improvement (MMI) on April 17, 2012. Claimant returned to Dr. Stechschulte on June 28, 2012, and received additional physical therapy. Dr. Stechschulte stated claimant continued to be at MMI and did not see her again after June 28, 2012.

In a letter dated June 29, 2012, Dr. Stechschulte wrote claimant sustained a 10 percent permanent partial impairment at the level of the right knee related to the work injury. Dr. Stechschulte noted he used the AMA *Guides* in arriving at his conclusion.[2] Further, Dr. Stechschulte indicated this impairment rating did not include any preexisting disease or degenerative conditions.[3]

Dr. Stechschulte testified there was a component in his rating for some exacerbation of claimant's significant preexisting degenerative arthritis. He stated claimant would eventually require a total right knee replacement, but the work accident was not the prevailing factor giving rise to the need for the replacement. Dr. Stechschulte said:

> Well, this woman had a significant injury to her knee almost 20 years before the work injury, had three surgical procedures performed, is morbidly obese, and has or had significant preexisting degenerative arthritis in her knee identified on X-ray, and also interoperatively with arthroscopic documentation, and she's also, you

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[3] See Stechschulte Depo., Ex. B at 1.

> know, 54, 55 years [old]. So I think it's likely that she will require a knee replacement unrelated to her work accident.[4]

Dr. Stechschulte testified claimant's work accident was the prevailing factor for the medial and lateral meniscal tears of the right knee. He also stated claimant would have required the knee replacement even had there been no meniscal injuries. He opined the "symptomatic component of [claimant's] arthritis was probably made worse by the accident," and symptomatic arthritis is an essential component to making a decision regarding knee replacement.[5]

Dr. John Vani, a board certified orthopedic surgeon, examined claimant on June 27, 2013, at the ALJ's request, for an independent medical evaluation (IME). Claimant complained of continued right knee pain, barometric changes in the right knee, and the inability to sit for longer than 30-45 minutes before changing positions. Dr. Vani reviewed claimant's history, medical records, and performed a physical examination. Dr. Vani noted claimant's reduced range of motion of the right knee and that she walks with a limp. Dr. Vani wrote in his report:

> [Claimant] has reached maximum medical improvement. It is more likely than not she will require additional treatment of this knee, most likely with total knee replacement surgery. Assigning causation for her future treatment is difficult, as her prior injury would have given some risk of arthritis and need for knee replacement. In my opinion, the prior injury would not achieve the 50% "more likely than not" threshold. I believe her work-related injury is the prevailing factor for her future treatments. Her loss of motion with the work-related injury, and her long-term success with ACL reconstruction up until the work related injury leads me to this conclusion.[6]

Using the AMA *Guides*, Dr. Vani opined claimant sustained a 12 percent impairment to the body as a whole due to the lack of range of motion in the knee. Dr. Vani testified this translates to a 28 percent impairment of the right lower extremity.

Records indicate claimant treated with Dr. Barry Rose in 2006 and obtained an MRI of the right knee at that time.[7] Dr. Vani was provided this MRI at his deposition for review and comparison with claimant's 2012 MRI. Dr. Vani testified claimant's 2006 MRI showed mild to moderate degenerative changes, indicating the arthritic process had begun. Dr.

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[4] Stechschulte Depo. at 16.

[5] *Id*. at 22.

[6] Vani Depo., Ex. 1 at 2.

[7] Claimant testified she had no recollection of treatment with Dr. Rose or obtaining an MRI in 2006. (See R.H. Trans. [Jan. 15, 2014] at 16 & 24-25.)

Vani opined the arthritic findings revealed in claimant's 2012 MRI were a natural progression of findings noted in the 2006 MRI. Further, Dr. Vani opined all findings from the 2012 MRI were preexisting except for the lateral and medial meniscus tears which occurred as a result of claimant's work-related accident. Dr. Vani testified:

> I think [claimant's 2012 work-related accident] is the prevailing factor. The injury I believe is the prevailing factor because – she certainly had some knee arthritis prior. There was a chance she would need a knee replacement, but now I think she almost certainly needs – near a 100 percent chance she's going to have a knee replacement, so I think that that injury is what caused the change of course and in my opinion is the prevailing factor.[8]

Dr. Vani stated:

> She's torn two more meniscus, the medial and lateral, and her course of progression of her symptoms has changed enough that she's no longer in that 15 to 40 percent risk. She's above 50 percent now with a new injury.[9]

Dr. Vani testified he thought the meniscal repair by Dr. Stechschulte can worsen or accelerate the arthritic process.

Respondent filed a motion to extend its terminal date to include additional evidence, which was denied by the ALJ. Respondent requested review of the ALJ's April 3, 2014, Order denying respondent's request for an extension of its terminal date. The Board Member determined:

> The ALJ is only obligated to extend terminal dates under K.S.A. 2011 Supp. 44-523(b) if all parties agree. In this case, claimant objected to an extension of terminal dates. If the parties cannot agree on an extension of terminal dates, the statute gives the ALJ discretion to grant or deny the motion. The ALJ did not exceed his jurisdiction by not extending respondent's terminal date.[10]

Claimant testified she continues to have problems with her right knee, which affect her ability to walk, run, climb stairs, or sit for extended periods of time. She noted she takes only over-the-counter medication for her pain and is not currently treating with a physician for her right knee. Claimant continues to work at respondent.

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[8] Vani Depo. at 53.

[9] *Id*. at 38.

[10] *Shapiro v. U.S.D. 229*, No. 1,063,336, 2014 WL 2616662 (Kan. WCAB May 28, 2014).

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states, in part:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f) states, in part:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
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> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
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> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications

K.S.A. 2011 Supp. 44-523(b) states, in part:

An extension of the foregoing time limits shall be granted if all parties agree. An extension of the foregoing time limits may also be granted:

(1) If the employee is being paid temporary or permanent total disability compensation;

> (2) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to submission by the claimant; or
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> (3) on application for good cause shown.

K.S.A. 2011 Supp. 44-525(a) states, in part:

> No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury.

ANALYSIS

1. Did claimant sustain an injury to her knee arising out of and in the course of her employment with respondent?

Claimant testified she tripped over the student's chair and fell on a table. She heard a loud pop from her knee, and her right knee gave out. This is a description of a sudden and unexpected traumatic event of an afflictive or unfortunate nature. Claimant's testimony in this regard is uncontradicted. For the purposes of K.S.A. 44-508(f)(2)(B), there is a causal connection between the conditions of her work as an interrelated resource teacher and the accident.

Both Drs. Vani and Stechschulte testified the accident described by claimant was the prevailing factor causing the meniscal tears. The claimant's testimony, coupled with the testimony of both physicians, supports a finding claimant suffered an injury by accident arising out of her employment with respondent for which, at minimum, claimant is entitled to medical benefits to repair the meniscal tears.

2. What is the nature and extent of claimant's disability?

Dr. Stechschulte assigned a 10 percent impairment to the right lower extremity. He wrote in his report that the impairment did not include any preexisting disease or degenerative conditions. Dr. Stechschulte testified there was a component for some exacerbation of her significant preexisting degenerative arthritis contained in his rating. He explained on cross-examination that he thought the injury "probably made her arthritis a little bit worse, more symptomatic."[11] Dr. Stechschulte did not explain the specific

[11] Stechschulte Depo. at 18.

provisions of the AMA *Guides* he used to arrive at his impairment rating, so it is difficult to determine the basis for his rating.

Dr. Vani rated claimant with a 28 percent impairment of the right lower extremity, based on claimant's loss of range of motion pursuant to the AMA *Guides*. Because claimant did not have any documented range of motion deficits prior to her work-related injury and subsequent surgery, Dr. Vani testified the loss of motion was more likely than not related to the claimant's work-related injury. Dr. Vani relied on the records of Dr. Rose for his opinion that claimant had no prior range motion loss. Dr. Vani's rating is for something new that did not exist prior to the work-related accident. There is no evidence in the record to contradict Dr. Vani's conclusion claimant had no range of motion deficit related to her right knee prior to her work-related injury.

Claimant's work-related injury did not solely aggravate, accelerate or exacerbate a preexisting condition. Claimant's work-related injury created an new physiological condition and impairment that would not exist but for the work-related injury. The Board agrees with Dr. Vani. The prevailing factor causing claimant's impairment is her work-related injury. Claimant sustained a 28 percent impairment to the right lower extremity arising out of and in the course of her employment with respondent on January 5, 2012.

3. Should respondent's request for an extension of its terminal date have been granted?

The ALJ is only obligated to extend terminal dates if all parties agree. In this case, claimant objected to an extension of terminal dates. If the parties cannot agree on an extension of terminal dates, K.S.A. 2011 Supp. 44-523(b) gives the ALJ discretion to grant or deny the motion.

In *Tull v. Atchison Leather Products, Inc.*,[12] the Kansas Court of Appeals stated:

> Terminal dates as defined by and set under K.S.A. 44-523(b) can be extended by agreement of the parties or by reason of specific statutory exceptions, which include "for good cause shown." The granting of an extension of the terminal dates for good cause shown carries a discretionary review similar to the granting or denying of a motion for a continuance. Such a ruling is discretionary and will not be disturbed on appeal unless there is a clear showing of an abuse of discretion.[13]

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[12] *Tull v. Atchison Leather Products, Inc.*, 37 Kan. App. 2d 87, 99, 150 P.3d 316 (2007).

[13] *Tull, supra,* at 99; citing *Surls v. Saginaw Quarries, Inc.,* 27 Kan. App. 2d 90, 96-97, 998 P.2d 514 (2000).

The Board does not find that ALJ Howard abused his discretion in denying respondent's motion to extend terminal dates. The ALJ, in his decision not to allow additional time for respondent to take testimony of two prior treating physicians, wrote:

> This evidence was clearly discoverable anytime prior to the first full hearing, and no good cause has been shown to determine that this information was not available had claimant's discovery deposition taken [sic] an appropriate manner.

The Board agrees. The existence of the prior treating physicians could easily have been discovered early in the proceedings. The respondent waited two weeks after claimant's deposition, until the day its terminal date ran, to request the extension. The ALJ did not abuse his discretion by denying respondent's motion to extend terminal dates.

4. May the Board address the constitutionality of the 2011 amendments to the Kansas Workers Compensation Act?

Claimant raises questions regarding the constitutionality of the 2011 amendments to the Kansas Workers Compensation Act. As we have stated in prior cases, the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold that an Act of the Kansas Legislature is unconstitutional.[14] The Board is not a court of proper jurisdiction to decide the constitutionality of laws in the State of Kansas. As such, the Board will not rule on claimant's constitutionality question in this matter. Accordingly, until an appellate court determines the constitutionality of the 2011 amendments to the Kansas Workers Compensation Act, the Board will continue to apply the statute as written.

5. Is claimant entitled to future medical treatment?

Dr. Stechschulte opined it is more probable than not claimant will not require future additional medical treatment as the result of her work-related injury. He thought claimant would eventually require a total right knee replacement, but the work accident was not the prevailing factor giving rise to the need for the replacement. Dr. Stechschulte believed claimant would need a knee replacement even if there had been no meniscal injuries. It is clear Dr. Stechschulte did not believe claimant would require future medical treatment resulting from her work-related injury.

Dr. Vani agreed the 2012 accident accelerated and exacerbated the preexisting arthritic process as opposed to being the prevailing factor of the arthritic process. Dr. Vani opined the work-related injury of January 5, 2012, was the prevailing factor in claimant's

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[14] See *Anderson v. Custom Cleaning Solutions*, No. 1,070,269, 2014 WL 5798476 (Kan. WCAB Oct. 27, 2014); *Carrillo v. Sabor Latin Bar & Grille*, No. 1,045,179, 2014 WL 5798458 (Kan. WCAB Oct. 24, 2014); *Pinegar v. Jack Cooper Transport*, No.1,059,928, 2014 WL 1758036 (Kan. WCAB Apr. 9, 2014).

need for future medical treatment. He thought the repair by Dr. Stechschulte could worsen or accelerate the arthritic process. Dr. Vani testified claimant's meniscal injury increased her risk of a knee replacement by 10 to 35 percent.

Based upon the medical evidence, it is more probable than not claimant will require future medical treatment related to her work-related injury. The parties may dispute claimant's potential need for a knee replacement, but that issue is not ripe for adjudication.

CONCLUSION

Claimant suffered an injury by accident arising out of her employment with respondent resulting in a 28 percent impairment of the right lower extremity. The ALJ's denial of respondent's motion to extend terminal dates is affirmed. The Board does not have the authority to rule on the constitutionality of the 2011 amendments to the Kansas Workers Compensation Act. Claimant is entitled to future medical treatment resulting from her work-related injury upon proper application to the director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated June 30, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2014.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge